United States Court of Appeals for the Second Circuit



JOINT APPENDIX

76-7550 ORIGINAL WITH PROOF ON SERVICE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

JOHN D. DAVIS,



Plaintiff-Appellant,

RJR FOODS, INC.,

Defendant-Appellee.

B P/

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

COLMAN & LINER
Attorneys for Plaintiff-Appellant
535 Fifth Avenue
New York, New York 10017

DAVIS POLK & WARDWELL
Attorneys for Defendant-Appellee
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New York, New York 10005

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

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DATE .	NR.	PROCEEDINGS
10-02-75	1	Filed complt. and issued summons. /
10-8-75	2	Filed Amended Complt.—Summons Iss
10-2175	3	Filed Surmons with Marshal's Return. Served: RJR Foods Inc. by R. H. Turner on 10-6-75.
10-22-75	4	Filed Suppl. Summons with Marshal's return. Served: VRJE Foods Inc. by. R. Turner on 10-10-75.
10-31-75	5	Filed Stip & Order that the time for deft to answer the complt is ext to 11-20-79Lasker, J.
11-20-75	ś	Filed Deft. RJR Fpods's 's order dismissing the compt pur 12 (b)(1)ret 12-18-75 Rm 1903 at 10AM
11-20-75 11-20-75 1-24-75		Filed deft's notice of motion to dismiss action. Filed Memo of Deft Ram Foods 's to deft. Filed Pltffs. Demand for jury trial.
03-03-76	9	Filed Pltff's. affidavit in opposition to Deft's. motion to dismiss. Filed Pltff's. memorandum in opposition to Deft's. motion to dismiss the complaint
05-14-76	11	Filed Pltff's. affidavit in support of request for evidentiary hearing.
10-12-76	12	Filed opinion # 45231 For reasonous stated, the defts motion to dismiss is granted. So ordered. Lasker J. (m/n)
11-4-76	13	Filed notice of appeal to the U.S.C.A. from the order of . Lasker dated 10-8-76 idsmissing complaint. m/n.
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United States Bistrict Court

FOR THE	
SOUTHERN DISTRICT OF	NEW YORK
	CIVIL ACTION FILE NO.
JOHN D. DAVIS,	
Plaintiff	SUMMONS
· · · · · · · · · · · · · · · · · · ·	
RJR FOODS, INC.,	
Defendant	
To the above named Defendant :	
You are hereby summoned and required to serve up	oon
COLMAN & LINER, ESQS.,	
COLLIAN & LINER, ESQS.,	
plaintiff's attorney 5, whose address 27 East 39th	Street, New York, New York
an answer to the complaint which is herewith served upo	on you, within 20 days after service of this
summons upon you, exclusive of the day of service. If y	ou fail to do so, judgment by default will be
taken against you for the relief demanded in the comp	plaint.
	Clerk of Court.
	Deputy Clerk.
Date: New York, N.Y. October 2, 1975	[Seal of Court]
Defendant's Address: 4 Corporate Park D	rive

NOTE:-This summons is issued pursuant to flule 4 of the Federal Rules of Civil Procedure.

A-4 COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS,

Plaintiff,

- against -

RJR FOODS, INC.,

Defendant.

JURISDICTION

1. This is an action for reinstatement, back pay, liquidated damages and punitive damages for willful violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C., Sections 621 to 634. Jurisdiction is founded on 28 U.S.C. Section 1331 and 29 U.S.C. Section 626C.

FIRST CAUSE OF ACTION

- At all times herein mentioned, plaintiff was a resident of the County of Fairfield, State of Connecticut.
- 3. Upon information and belief, at all times herein mentioned, defendant, RJR FOODS, INC. (hereinafter referred to as "RJR") was a corporation duly qualified to do business in the State of New York with an office at Third Avenue, New York, New York, and presently maintains an office at 4 Corporate Park Drive, White Plains, New York.

- 4. At all times herein mentioned, plaintiff was employed by the defendant as "Brand Director" of several lines of products owned and operated by the defendant; said lines and products being Vermont Maid Syrup, Davis Baking Powder, Brer Rabbit Syrups and Brer Rabbit Molasses, plus related new breakfast products, accountable only to the President of the defendant.
- 5. At all times herein mentioned, plaintiff was employed by defendant in an executive capacity supervising the work of other executives and employees of the defendant in the various lines supervised by the plaintiff aggregating in excess of 300 persons. These employees included amongst others, one National Sales Manager, seven Regional Sales Managers, thirty-one District Managers, one hundred eighty territorial local-salesmen and brokers, four plant managers, forty plant employees, eight financial people, twenty research and development experts, ten purchasing agents, three sales promotion executives, three public relation executives, three quality control executives and six distribution executives. Some of the employees supervised and accountable to plaintiff were in part accountable to other Brand Directors of the defendant.
- 6. Plaintiff, in the supervision of the various lines assigned to him, had complete authority and responsibility over profits and losses incurred by these lines, sales of

other respective products, all phases of manufacturing of the products including purchase of raw material and fabrication thereof including supervision of the operating of the manufacturing entities and other mechanical operations and production. In addition thereto, plaintiff was in charge of purchasing, advertising, promotion, research and development required for the obtaining of the raw materials for the products, their manufacture and eventual sale.

- 7. The total budget for the various lines prepared and spent by the plaintiff amounted to approximately \$8,000,000.00 per annum in each of the years of plaintiff's employment by the defendant.
- 8. Plaintiff was hired by the defendant initially in the same capacity for two lines only, i.e., Brand Director of Vermont Maid Syrup and Davis Baking Powder, and at the time of the inception of his employment was 44 years of age having been born on December 3, 1923.
- 9. Plaintiff's initial hiring was under a three year bonus contract plan expiring December 31, 1971 at the rates more particularly set forth in Exhibit "A" annexed hereto and made part hereof. Upon the expiration of the first contract, defendant entered into a second incentive bonus plan with plaintiff with the term commencing January 1, 1971 and terminating December 31, 1973 upon the rates and terms as more particularly set forth in Exhibit "B" annexed hereto and made part hereof.

10. That plaintiff's income as Product Line Director for defendant was as follows:

	Year	Salary	Bonus (Earned from obtaining	Total
			profitability pursuant to formula in incentive plan annexed)	
	1968	\$25,250	(payable following year)	\$25,250.
	1969	\$27,000	\$2,000 (payable from previous year's business)	\$29,000.
	1970	\$30,000	\$2,500 (payable from previous year's business)	\$32,250.
	1971	\$30,000	\$19,500 (payable from previous year's business)	\$49,500.
	1972*	\$32,000**	\$18,000 (payable from previous year's business)	\$50,000.
++>	h 10/6/7	2)		

(*through 10/6/72)

11. In addition to the salary and bonus as above set forth, plaintiff, while employed by defendant, was entitled to other benefits such as (a) hospitalization and major medical insurance for himself and his wife and his three children which included payment for pharmaceuticals, prosthetics, and nursing home care; (b) term life insurance in the sum of \$100,000.00; (c) stock participation plan in which plaintiff was permitted to purchase stock of the defendant in an annual amount of up to ten (10%) percent of his base pay to which the defendant would add twenty (20%) percent of the employee's contribution; (d) college scholarship for children; (e) liberal vacation plan; (f) liberal retirement plan; (g) free complete physical examination; and (h) participation in payroll savings plan.

- 12. At all times during plaintiff's employment by defendant, he performed all duties assigned to him by his immediate supervisor, the defendant's President, and such performance was consistently on a high level and satisfactory to company policy as indicated by the annual increases in bonus' reflecting plaintiff's ability and the tasks assigned to him, and his annual salary increases.
- 13. Throughout the course of plaintiff's employment by the defendant, he dutifully and properly carried out all tasks assigned to him by his immediate supervisor, the President of the defendant.
- 14. In the Spring of 1972, several corporate changes in the defendant took place as follows. One, Sam Angotti, formerly the Chairman of the Board of Directors of the defendant resigned as Chairman of the Board and was elected President of the Corporation. One, John Phillips, the former President of the Company, became Chairman of the Board.
- 15. After the corporate changes as hereinabove set forth, President Angotti called a meeting of all corporate executives including the plaintiff, and at said meeting said that his standard of evaluating executive personnel was

 (a) the production of bottom line profit; and (b) development of new products. At this time, plaintiff had met and was meeting the criteria set forth by President Angotti.
- 16. That subsequent to the corporate changes above referred to, one, William Frantz, was elected Vice President

for Marketing of the defendant. Prior to and subsequent
to Mr. Frantz's election as Vice President in charge of
Marketing, he constantly referred to plaintiff as "Dad" in
a sneering, derogatory manner both at public and private
meetings even though said Mr. Frantz is
approximately five years younger than plaintiff. Mr. Frantz
was, at the time of the events referred to in this complaint,
a relatively youthful-looking 38 or 39 year old executive
and plaintiff has always been portly and white-haired, ever
since young manhood, and physically always appeared some
eight to ten years older than his actual age although his
actions in performance and profitability belie such older appearance
17. On June 5, or June 6, 1972, the day that Mr. Frantz

was elected Vice President for Marketing of the defendant, he personally told the plaintiff in a face-to-face meeting that (a) the defendant corporation was in the process of re-organization; and (b) that because of a change of personnel, there was no place in the corporate set-up of the defendant for a person as highly qualified as the plaintiff; and (c) that plaintiff would no longer be able to earn the salary and bonus at the levels previously earned and that in any event, that plaintiff was too old to carry on the duties and functions previously assigned to him. In addition, Mr. Frantz told the plaintiff that there was no position open that plaintiff could rind satisfactory for his qualifications even if plaintiff wanted to accept such a job at a lower corporate and income level. The termination of plaintiff's employment because of age was intentional, knowingly and voluntarily on defendant's part.

- that Mr. Angotti, the President of the defendant, wanted plaintiff physically out of the office by the Friday of than week although plaintiff would continue and in fact did continue on the payroll with full benefits until October 6, 1972. From June 5, or June 6, 1972, until October 6, 1972, plaintiff was ready, willing and able to perform all tasks assigned to him in a manner previously performed and remained as an employee of the defendant in all respects including the right to receive all fringe benefits as hereinabove referred to up to and including October 6, 1972 when plaintiff's employment was terminated.
- 19. When plaintiff was informed that his employment would be terminated on October 6, 1972, he ascertained that his position as Brand Director would be filled by a Brand Director under 40 years of age, and in fact, such replacement did take place and one, Jerry Arlege, was so appointed.
- 20. On the very day that Vice President Frantz told plaintiff of the termination of his employment as of October 6, 1972, he and Mr. Sam Angotti terminated the employment of seven other executives, six of whom were over the age of 40 years. Upon information and belief, these other terminated executives were subsequently replaced by vounger persons most of whom were under 40 years of age. Those illegal

replacements are consistent with statements periodically made by Mr. Frantz that all innovations would come from the field and that "young kids" in their 20's and early 30's would be brought into the company.

- 21. As part of the discriminatory practice engaged in by the defendant, executives Gordon and Sheets who formerly reported directly to the President, were made Vice-Presidents and were required to report to Vice-President Frantz and their earning capacities were greatly reduced along with reduction / responsibilities and company position. This form of company punishment caused the resignations of executives Gordon and Sheets, both of whom were over 40 years of age. Employee Gordon was replaced by a person from outside the company of the defendant, under 40 years of age, who was not elected a Vice-President. When employee Sheets left the company, on information and belief, he was replaced by an existing employee of the company who was under 40 years of age and who was not elected a Vice-President.
- 22. Upon information and belief, within the next several months, many other executives of the defendant over the age of 40 years had their services terminated or had their job functions so revised as to cause them to terminate their employment, or had their incomes lowered so as to cause their termination, all of which resulted in a significant age-drop of senior executive personnel, many of whom were replaced by personnel under 40 years of age.

A-12 COMPLAINT

- 23. At no time was plaintiff ever told of any reason for the termination of his employment even though request for such explanation was made to three successive Presidents of the defendant company, Messrs. Angotti, Peoples and Sticht. (Peoples and Sticht were President of RJR Industries, the parent company); the only reasons ever advanced for the termination of plaintiff's employment were those set forth as having been given by Vice-President Frantz whose basic complaint against plaintiff was that he was too old.
- 24. On June 27, 1974, plaintiff filed a complaint concerning his illegal discharge by the defendant with the U.S. Department of Labor at 26 Federal Plaza, New York, N.Y.
- 25. Subsequent to the complaint/filed by plaintiff with the U.S. Department of Labor, one of the executives of the defendant, Clayton Shrewsbury, Vice President of Finance,

 RJR Foods, assigned to the Winston-Salem, North Carolina office, came to New York, and told plaintiff that he was familiar with the details of the termination of plaintiff's employment and during the course of that conversation informed the plaintiff that when the executive personnel was moved from New York to Winston-Salem, North Carolina, the defendant took with it basically only those marketing executives under with a few exceptions

 40 years of age/and had no room for executive personnel over 40 years of age, such as plaintiff.

- 26. Upon information and belief, the complaint of plaintiff to the U.S. Department of Labor was referred to the Greensboro, North Carolina office which caused an investigation to be made lasting over a period of many months terminating in a written report sent to the New York Compliance Office on or about the end of July, 1975.
- 27. Upon information and belief, that during the course of this investigation, the defendant, on or about May 30, 1975, requested a thirty day period to review the wilfull violation claim with corporate management. Upon information and belief, the representative of the U.S. Department of Labor did not grant such request of the defendant unless and until he had obtained the consent of his immediate superior and the consent of the plaintiff to defendant's request for the thirty day extension. Such consent was given by both the U.S. Department of Labor and the plaintiff, and is contained in the files of the U.S. Department of Labor.
- 28. Upon information and belief and during the course of the investigation of the U.S. Department of Labor, the defendant informed the U.S. Department of Labor that the termination date of plaintiff's employment was and had always been considered by it to be October 6, 1972, and upon information and belief all references in the file with respect to said termination date are October 6, 1972.

- 29. Upon information and belief, the investigation by the U.S. Department of Labor shows a wilfull violation of wilful the Employment Act of 1967 and notwithstanding such /violation, the U.S. Department of Labor has failed and refused to protect the rights of the plaintiff, including its failure to reveal to plaintiff the contents of said file, although from time to time, having given oral summaries to plaintiff, and said U.S. Department of Labor is continuing to secrete the contents of said file in violation of Freedom of Information Act.
- 30. By reason of the failure and refusal of the U.S. Department of Labor to proceed to enforce plaintiff's statutory rights arising out of the wilful violation by the defendant as hereinabove set forth to plaintiff's detriment, plaintiff has been compelled to institute the within action for plaintiff's damages.
- 31. Plaintiff has been damaged by the deprivation of his salary and bonus' since October 6, 1972 and all the fringe benefits to which he would be entitled. In addition thereto, plaintiff's standard of living has been completely altered, all his savings have been depleted, both he and his family has suffered the trauma of unemployment and unemployability and as a result of all of such, have found themselves to be socially shunned and deprived of the standard of living formerly enjoyed by them.

WHEREFORE, Plaintiff demands judgment as follows:

- (1) Reinstatement to his former position plus such normal increases in salary, accretions, emoluments, prestige, fringe benefits and promotions; or if such position does not exist, to a position in the office of the defendant at a level consistent with his prior employment and an assurance of such continued employment with all the emoluments and perquisites that go therewith;
- (2) in addition, payment to plaintiff of all the sums lost by him from October 6, 1972, the date of termination, to the date of reinstatement, which sums include salary, bonus' on an average basis and all fringe benefits;
- (3) in addition to reinstatement as set forth in paragraph 1 above, and only if there is reinstatement, all other monetary damages suffered by the plaintiff as a result of defendant's actions from the date of termination to date, in an amount of FIFTY THOUSAND (\$50,000.00) DOLLARS;
- (4) in the alternative, if there is no reinstatement and repayment as set forth in paragraphs 1, 2, and 3 above. damages in the sum of FIVE HUNDRED THOUSAND (\$500,000.00) DOLLARS;
- (5) Punitive damages in the sum of FIVE MILLION (\$5,000,000.00) DOLLARS;
- (6) Counsel fees for the reasonable value of the services in an amount to be determined by the Court,

all with interests, costs and disbursements of this action.

1

COLMAN & LINER

by:

LEON LINER - a/member of the firm

Office and P. O. Address 27 East 39th Street New York, N.Y. 10016 212/689-6703

EXHIBIT A TO COMPLAINT - BONUS CONTRACT PLAN EXPIRING DECEMBER 31, 1971

VERMONT MAID

BASE

For achievement of profit budget for calendar year and spending not less than budgeted for advertising and promotion unless mutually agreed

For each \$50,000 profit before tax exceeding profit budget and spending not less than originally budgeted for advertising and promotion.

For profit increase in next three years in total of \$500,000 and spending not less than 1968 percentage of advertising and promotion in 1970 unless mutually agreed

For each \$50,000 profit increase before tax over \$500,000 in total for three years at end of three years with same provision as above on 1970 advertising and promotion percentage.

\$25,000

20% bonus of one year's base salary*

5% of one year's base salary and proportionate over \$50,000

50% bonus of one year's base salary

5% bonus of one year's base salary

^{*} Profit of 97.9% of budget or less will earn no bonus. Achievement of 98 to 98.9% will reduce the dollar bonus amount earned by 20%., achievement of 99 to 99.9% will reduce the dollar bonus amount earned by 10%.

EXHIBIT B TO COMPLAINT - SECOND INCENTIVE BONUS PLAN TERMINATING DECEMBER 31, 1973

INCENTIVE COMPENSATION PLAN - 1971

BRAND DIRECTOR

John Davis

ONE-YEAR INCENTIVE PLAN

7. of Base for 7. Base for Each Achieving Additional \$200,000 Profit \$30,000 35% 10%

THREE-YEAR INCENTIVE PLAN

For a combined operating profit increase in 1973 as compared to 1970 for a total of \$500,000 = 50% of 1973's base salary. The brands involved are Vermont Maid, Brer Rabbit and Davis Baking Powder. The combined profit in 1970 was \$916,000. The percentage spent for advertising and sales promotion in 1970 was 12.1%. If the percentage spent for advertising and promotion in 1973 is less than the percentage spent in 1970, unless mutually agreed to by the President as it relates to incentive compensation, this resulting difference, adjusted to dollars will be deducted from the operating profit for 1973 to determine the incentive compensation.

For each \$100,000 operating profit increase in 1973 over the \$500,000 increase over 1970 or portion thereof = 10% of 1973's base salary. The same provisions on advertising and sales promotion applies to the 1973 calculation as shown in the paragraph above.

. For this purpose total salary payments means actual salary earned in 1971 and excludes incentive payments, moving expense payments, special awards and any other miscellaneous payments made during the year.

SUPPLEMENTAL SUMMONS SUMMONS IN A CIVIL ACTION

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Judge Lasker

CIVIL ACTION FILE NO.75 CIV.48

JOHN D. DAVIS,

......

Plaintiff

SUPPLEMENTAL SUMMIONS

RYR FOODS, INC.,

To the above named Defendant :

You are hereby summoned and required to serve upon

COLMAN & LINER, ESQS.,

plaintiff's attorney 5, whose address 27 East 39th Street, Hew York, New York

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint

Date: New York, N.Y. October 5, 1975

[Seal of Court]

Defendant's Address: 4 Corporate Park Drive White Plains, N.Y.

NOTE:-This summens is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

A-20 AMENDED COMPLAINT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS,

Plaintiff,

- against -

RJR FOODS, INC.,

Defendant.

JURISDICTION

1. This is an action for reinstatement, back pay, liquidated damages and punitive damages for willful violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C., Sections 621 to 634. Jurisdiction is founded on 28 U.S.C. Section 1331 and 29 U.S.C. Section 626C.

FIRST CAUSE OF ACTION

- 2. At all times herein mentioned, plaintiff was a resident of the County of Fairfield, State of Connecticut.
- 3. Upon information and belief, at all times herein mentioned, defendant, RJR FOODS, INC. (hereinafter referred to as "RJR") was a corporation duly qualified to do business in the State of New York with an office at Third Avenue, New York, New York, and presently maintains an office at 4 Corporate Park Drive, White Plains, New York.

A-21 AMENDED COMPLAINT

- 4. At all times herein mentioned, plaintiff was employed by the defendant as "Brand Director" of several lines of products owned and operated by the defendant; said lines and products being Vermont Maid Syrup, Davis Baking Powder, Brer Rabbit Syrups and Brer Rabbit Molasses, plus related new breakfast products, accountable only to the President of the defendant.
- by defendant in an executive capacity supervising the work of other executives and employees of the defendant in the various lines supervised by the plaintiff aggregating in excess of 300 persons. These employees included amongst others, one National Sales Manager, seven Regional Sales Managers, thirty-one District Managers, one hundred eighty territorial local salesmen and brokers, four plant managers, forty plant employees, eight financial people, twenty research and development experts, ten purchasing agents, three sales promotion executives, three public relation executives, three quality control executives and six distribution executives. Some of the employees supervised and accountable to plaintiff were in part accountable to other Brand Directors of the defendant.
 - 6. Plaintiff, in the supervision of the various lines assigned to him, had complete authority and responsibility over profits and losses incurred by these lines, sales of

other respective products, all phases of manufacturing of the products including purchase of raw material and fabrication thereof including supervision of the operating of the manufacturing entities and other mechanical operations and production. In addition thereto, plaintiff was in charge of purchasing, advertising, promotion, research and development required for the obtaining of the raw materials for the products, their manufacture and eventual sale.

- 7. The total budget for the various lines prepared and spent by the plaintiff amounted to approximately \$8,000,000.00 per annum in each of the years of plaintiff's employment by the defendant.
- 8. Plaintiff was hired by the defendant initially in the same capacity for two lines only, i.e., Brand Director of Vermont Maid Syrup and Davis Baking Powder, and at the time of the inception of his employment was 44 years of age having been born on December 3, 1923.
- 9. Plaintiff's initial hiring was under a three year bonus contract plan expiring December 31, 1971 at the rates more particularly set forth in Exhibit "A" annexed hereto and made part hereof. Upon the expiration of the first contract, defendant entered into a second incentive bonus plan with plaintiff with the term commencing January 1, 1971 and terminating December 31, 1973 upon the rates and terms as more particularly set forth in Exhibit "B" annexed hereto and made part hereof.

That plaintiff's income as Product Line Director for defendant was as follows:

	Year	Salary	Bonus (Earned from obtaining	Total
			profitability pursuant to formula in incentive plan annexed)	
	1968	\$25,250	(payable following year)	\$25,250.
	1969	\$27,000	\$2,000 (payable from previous year's business)	\$29,000.
	1970	\$30,000	\$2,500 (payable from previous year's business)	\$32,250.
	1971	\$30,000	\$19,500 (payable from previous year's business)	\$49,500.
	1972*	\$32,000**	\$18,000 (payable from previous year's business)	\$50,000.
*through	10/6/73	2)		

11. In addition to the salary and bonus as above set forth, plaintiff, while employed by defendant, was entitled to other benefits such as (a) hospitalization and major medical insurance for himself and his wife and his three children which included payment for pharmaceuticals, prosthetics, and nursing home care; (b) term life insurance in the sum of \$100,000.00; (c) stock participation plan in which plaintiff was permitted to purchase stock of the defendant in an annual amount of up to ten (10%) percent of his base pay to which the defendant would add twenty (20%) percent of the employee's contribution; (d) college scholarship for children; (e) liberal vacation plan; (f) liberal retirement plan; (g) free complete physical examination; and (h) participation in payroll savings plan.

- 12. At all times during plaintiff's employment by defendant, he performed all luties assigned to him by his immediate supervisor, the defendant's President, and such performance was consistently on a high level and satisfactory to company policy as indicated by the annual increases in bonus' reflecting plaintiff's ability and the tasks assigned to him, and his annual salary increases.
- 13. Throughout the course of plaintiff's employment by the defendant, he dutifully and properly carried out all tasks assigned to him by his immediate supervisor, the President of the defendant.
- 14. In the Spring of 1972, several corporate changes in the defendant took place as follows. One, Sam Angotti, formerly the Chairman of the Board of Directors of the defendant resigned as Chairman of the Board and was elected President of the Corporation. One, John Phillips, the former President of the Company, became Chairman of the Board.
- 15. After the corporate changes as hereinabove set forth, President Angotti called a meeting of all corporate executives including the plaintiff, and at said meeting said that his standard of evaluating executive personnel was (a) the production of bottom line profit; and (b) development of new products. At this time, plaintiff had met and was meeting the criteria set forth by President Angotti.
- 16. That subsequent to the corporate changes above referred to, one, William Frantz, was elected Vice President

A-25 AMENDED COMPLAINT

for Marketing of the defendant. Prior to and subsequent to Mr. Frantz's election as Vice President in charge of Marketing; he constantly referred to plaintiff as "Dad" in a sneering, derogatory manner both at public and private meetings even though said Mr. Frantz is approximately five years younger than plaintiff. Mr. Frantz was, at the time of the events referred to in this complaint, a relatively youthful-looking 38 or 39 year old executive and plaintiff has always been portly and white-haired, ever since young manhood, and physically always appeared some eight to ten years older than his actual age although his actions in performance and profitability belie such older appearance.

17. On June 5, or June 6, 1972, the day that Mr. Frantz was elected Vice President for Marketing of the defendant, he personally told the plaintiff in a face-to-face meeting that (a) the defendant corporation was in the process of re-organization; and (b) that because of a change of personnel, there was no place in the corporate set-up of the defendant for a person as highly qualified as the plaintiff; and (c) that plaintiff would no longer be able to earn the salary and bonus at the levels previously earned and that in any event, that plaintiff was too old to carry on the duties and functions previously assigned to him. In addition, Mr. Frantz told the plaintiff that there was no position open that plaintiff could find satisfactory for his qualifications even if plaintiff wanted to accept such a job at a lower corporate and income level. The termination of plaintiff's employment because of age was intentional, knowingly and voluntarily on defendant's part.

A-26 AMENDED COMPLAINT

- that Mr. Angotti, the President of the defendant, wanted plaintiff physically out of the office by the Friday of than week although plaintiff would continue and in fact did continue on the payroll with full benefits until October 6, 1972. From June 5, or June 6, 1972, until October 6, 1972, plaintiff was ready, willing and able to perform all tasks assigned to him in a manner previously performed and remained as an employee of the defendant in all respects including the right to receive all fringe benefits as hereinabove referred to up to and including October 6, 1972 when plaintiff's employment was terminated.
- 19. When plaintiff was informed that his employment would be terminated on October 6, 1972, he ascertained that his position as Brand Director would be filled by a Brand Director under 40 years of age, and in fact, such replacement did take place and one, Jerry Arlege, was so appointed.
- 20. On the very day that Vice President Frantz told plaintiff of the termination of his employment as of October 6, 1972, he and Mr. Sam Angotti terminated the employment of seven other executives, six of whom were over the age of 40 years. Upon information and belief, these other terminated executives were subsequently replaced by younger persons most of whom were under 40 years of age. Those illegal

A-27 AMENDED COMPLAINT

replacements are consistent with statements periodically made by Mr. Frantz that all innovations would come from the field and that "young kids" in their 20's and early 30's would be brought into the company.

- 21. As part of the discriminatory practice engaged in by the defendant, executives Gordon and Sheets who formerly reported directly to the President, were made Vice-Presidents and were required to report to Vice-President Frantz and of their earning capacities were greatly reduced along with reduction responsibilities and company position. This form of company punishment caused the resignations of executives Gordon and Sheets, both of whom were over 40 years of age. Employee Gordon was replaced by a person from outside the company of the defendant, under 40 years of age, who was not elected a Vice-President. When employee Sheets left the company, on information and belief, he was replaced by an existing employee of the company who was under 40 years of age and who was not elected a Vice-President.
- 22. Upon information and belief, within the next several months, many other executives of the defendant over the age of 40 years had their services terminated or had their job functions so revised as to cause them to terminate their employment, or had their incomes lowered so as to cause their termination, all of which resulted in a significant age-drop of senior executive personnal, many of whom were replaced by personnel under 40 years of age.

A-28 AMENDED COMPLAINT

- 23. At no time was plaintiff ever told of any reason for the termination of his employment even though request for such explanation was made to three successive Presidents of the defendant company, Messrs. Angotti, Peoples and Sticht. (Peoples and Sticht were President of RJR Industries, the parent company); the only reasons ever advanced for the termination of plaintiff's employment were those set forth as having been given by Vice-President Frantz whose basic complaint against plaintiff was that he was too old.
- 24. On June 27, 1974, plaintiff filed a complaint concerning his illegal discharge by the defendant with the U.S. Department of Labor at 26 Federal Plaza, New York, N.Y. being
- 25. Subsequent to the complaint/filed by plaintiff with the U.S. Department of Labor, one of the executives of the defendant, Clayton Shrewsbury, Vice President of Finance, RJR Foods, assigned to the Winston-Salem, North Carolina office, came to New York, and told plaintiff that he was familiar with the details of the termination of plaintiff's employment and during the course of that conversation informed the plaintiff that when the executive personnel was moved from New York to Winston-Salem, North Carolina, the defendant took with it basically only those marketing executives under with a few exceptions

 40 years of age/and had no room for executive personnel over 40 years of age, such as plaintiff.

- 26. Upon information and belief, the complaint of plaintiff to the U.S. Department of Labor was referred to the Greensboro, North Carolina office which caused an investigation to be made lasting over a period of many months terminating in a written report sent to the New York Compliance Office on or about the end of July, 1975.
- 27. Upon information and belief, that during the course of this investigation, the defendant, on or about May 30, 1975., requested a thirty day period to review the wilfull violation claim with corporate management. Upon information and belief, the representative of the U.S. Department of Labor did not grant such request of the defendant unless and until he had obtained the consent of his immediate superior and the consent of the plaintiff to defendant's request for the thirty day extension. Such consent was given by both the U.S. Department of Labor and the plaintiff, and is contained in the files of the U.S. Department of Labor.
- 28. Upon information and belief and during the course of the investigation of the U.S. Department of Labor, the defendant informed the U.S. Department of Labor that the termination date of plaintiff's employment was and had always been considered by it to be October 6, 1972, and upon information and belief all references in the file with respect to said termination date are October 6, 1972.

A-30 AMENDED COMPLAINT

- by the U.S. Department of Labor shows a wilfull violation of wilful the Employment Act of 1967 and notwithstanding such /violation the U.S. Department of Labor has failed and refused to protect the rights of the plaintiff, including its failure to reveal to pursuant to the statutes in such cases made and provided, plaintiff the contents of said file, /although from time to time, having given oral summaries to plaintiff, and said U.S. Department of Labor is continuing to secrete the content of said file in violation of Freedom of Information Act.
 - 30. By reason of the failure and refusal of the U.S. Department of Labor to proceed to enforce plaintiff's statutory rights arising out of the wilful violation by the defendant as hereinabove set forth to plaintiff's detriment, plaintiff has been compelled to institute the within action for plaintiff's damages.
 - 3I. That such notice of intention to sue, as could be given, was given to the Secretary of Labor of the United States.
 - 32. Plaintiff has been damaged by the deprivation of his salary and bonus since October 6, 1972 and all the fringe benefits to which he would be entitled. In addition thereto, plaintiff's standard of living has been completely altered, all his savings have been depleted, both he and his family have suffered the trauma of unemployment and unemployability and as a result of all of such, have found themselves to be socially shunned and deprived of the standard of living formerly enjoyed by them.

A-31 AMENDED COMPLAINT

WHEREFORE, Plaintiff demands judgment as follows:

- (1) Reinstatement to his former position plus such normal increases in salary, accretions, emoluments, prestige, fringe benefits and promotions; or if such position does not exist, to a position in the office of the defendant at a level consistent with his prior employment and an assurance of such continued employment with all the emoluments and perquisites that go therewith;
- (2) in addition, payment to plaintiff of all the sums lost by him from October 6, 1972, the date of termination, to the date of reinstatement, which sums include salary, bonus' on an average basis and all fringe benefits;
- (3) in addition to reinstatement as set forth in paragraph 1 above, and only if there is reinstatement, all other monetary damages suffered by the plaintiff as a result of defendant's actions from the date of termination to date, in an amount of FIFTY THOUSAND (\$50,000.00) DOLLARS;
- (4) in the alternative, if there is no reinstatement and repayment as set forth in paragraphs 1, 2, and 3 above. damages in the sum of FIVE HUNDRED THOUSAND (\$500,000.00) DOLLARS:
- (5) Punitive damages in the sum of FIVE MILLION (\$5,000,000.00) DOLLARS;
- (6) Counsel fees for the reasonable value of the services in an amount to be determined by the Court,

AMENDED COMPLAINT

all with interests, costs and disbursements of this action.

COLMAN & LINER

by:

Leon Liner - a member of the firm Office and P.O. Address 27 East 39th Street New York, N.Y. 10016 212 689-6703

EXHIBITS TO AMENDED COMPLAINT:

- A BONUS CONTRACT PLAN EXPIRING DECEM-BER 31, 1971 (reproduced herein at page A-17)
- B SECOND INCENTIVE BONUS PLAN TERMINA-TING DECEMBER 31, 1973 (reproduced herein at page A-18)

A-34 MARSHAL'S RETURN

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COLMAN & LINER 27 E. 39th Str		e e en		Number perties to be served in this case	.,
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3. NOTICE OF SERVICE

A-35 STIPULATION EXTENDING TIME TO ANSWER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-against-

JOHN D. DAVIS,

Plaintiff, : 75 Civ. 4862 (M.E.L.)

RJR POODS, INC.,

. STIPULATION

Defendant. :

IT IS HEREBY STIPULATED BY AND BETWEEN the undersigned, that the time of defendant RJR Foods to appear and to move or answer with respect to the complaint herein be and the same hereby is extended from October 30, 1975 to and including November 20, 1975.

Dated: New York, New York October 27, 1975

> Leon Liner Colman & Liner Attorneys for Plaintiff John D. Davis 27 Last 39th Street New York, New York

James W.B. Benkard Davis Polk & Wardwell Attorneys for Defendant RJR Foods, Inc. 1 Chase Manhattan Plaza

New York, New York 10005

(212) 422-3400

SO ORDERED

U.S.D.J.

A-36 NOTICE OF MOTION TO DISMISS UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK JOHN D. DAVIS, Plaintiff,

:

: 75 Civ. 4862

(M.E.L.)

-against-

RJR FOODS, INC.,

: NOTICE OF MOTION

Defendant. :

PLEASE TAKE NOTICE, that upon the annexed affidavit of James W. B. Benkard sworn to November 20, 1974, the accompanying memorandum of law, the complaint herein and upon all the proceedings heretofore had herein, defendant RJR Foods, Inc. will move this Court on December 18, 1975, at Room 1903, United States Court House, Foley Square, New York, New York at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because this Court lacks jurisdiction over the subject matter herein and for such other and further relief as may be proper.

Dated: New York, New York November 20, 1975

DAVIS POLK & WARDWELL ~

Attorneys for Defendant

RJR Foods, Inc. l Chase Manhattan Plaza New York, New York 10005 (212) 422-3400

TO:

Colman & Liner Attorney for Plaintiff 27 East 39th Street New York, New York

A-37

AFFIDAVIT OF JAMES W. B. BENKARD, ESQ., FOR DEFENDANT, IN SUPPORT OF MOTION UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS,

75 Civ. 4862 (M.E.L.)

Plaintiff, :

-against-

SPRT

RJR FOODS, INC.,

AFFIDAVIT IN SUPPORT OF

MOTION TO DISMISS

Defendant. :

- •

:

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK)

JAMES W. B. BENKARD, being duly sworn, deposes and says:

- 1. I am a member of the Bar of this Court and of the firm of Davis Polk & Wardwell, attorneys for the defendant RJR Foods. Inc. ("RJR Foods") and I am fully familiar with the facts and the proceedings heretofore had herein.
- 2. This action was brought by John D. Davis who was employed, until June 6, 1972, by RJR Foods. From the amended complaint it appears that Mr. Davis claims he was dismissed by RJR Foods in 1972 for reasons related to his age and thus he purports to sue RJR Foods under the federal Age Discrimination in Employment Act, 29 U.S.C. § 626. The amended complaint is attached hereto as Exhibit A.
- 3. I make this affidavit in support of the motion of RJR Foods to dismiss the complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure,

AFFIDAVIT OF JAMES W. B. BENKARD, ESQ., FOR DEFENDANT, IN SUPPORT OF MOTION because this Court lacks jurisdiction over the claims herein. PRIOR PROCEEDINGS 4. This action was originally filed in this Court on October 2, 1975. An amended complaint was thereupon served and filed on October 8, 1975. RJR Foods has not served an answer to the complaint but submits the instant motion in lieu thereof. FACTS According to the amended complaint, Mr. Davis was employed by RJR Foods as a brand director of several of its lines of food products (Amended Complaint ¶ 4). Mr. Davis occupied an executive position and possessed authority and responsibility over profits and losses incurred by the lines of products he directed as well as authority over the manufacture, promotion, sales and development of these lines (Amended Complaint ¶¶ 5-7). 6. Mr. Davis was hired by RJR Foods in 1967 at which time he was 44 years of age (Amended Complaint ¶ 8). 7. As an employee of RJR Foods, Mr. Davis received a salary plus a bonus computed in accordance with RJR Foods' incentive compensation plans then in effect. Mr. Davis was also entitled to participate in various employee benefits, including hospitalization, insurance, stock participation and savings plans, vacation plans, retirement plans, and scholarship programs (Amended Complaint ¶¶ 9-11).

AFFIDAVIT OF JAMES W. B. BENKARD, ESQ., FOR DEFENDANT, IN SUPPORT OF MOTION

- 8. On June 6, 1972, Mr. Davis stopped working for RJR Foods, although he continued to receive certain benefits until October 6, 1972 (Amended Complaint ¶ 18).
- 9. On June 27, 1974 Mr. Davis filed a complaint with the Department of Labor at its office at 26 Federal Plaza, New York, New York, alleging that his termination by RJR Foods was based upon reasons relating to his age (Amended Complaint § 24).
- 10. Mr. Davis had no contact with either the Department of Labor or the Secretary of Labor prior to June 27, 1974.
- 11. Mr. Davis has brought no action against RJR Foods for alleged discrimination in employment because of his age in the New York State Division of Human Rights or with any other similar authority in any other state.

THE MOTION

accompanying memorandum of law, it is respectfully submitted that RJR Foods is entitled to dismissal of the complaint in this action because this Court lacks jurisdiction over the subject matter herein. This complaint should be dismissed because Mr. Davis has failed to allege that he has complied with two jurisdictional requirements of the Age Discrimination in Employment Act, 29 U.S.C. § 626(d) and § 633(b), as to timely notice to be given to the Secretary of Labor of intention to bring suit under the Act and as to permitting appropriate state authorities to proceed with the merits of his claim before a federal action is commenced.

A-40
AFFIDAVIT OF JAMES W. B. BENKARD, ESQ., FOR DEFENDANT. IN SUPPORT OF MOTION

WHEREFORE, your deponent respectfully demands that the complaint herein be dismissed and such other and further relief as the Court may deem just and proper.

James W. B. Benkard

Sworn to before me this 20th day of November, 1975

Notary Public

Notary Public, State of New York
No. 41-3502608
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1977

EXHIBIT A TO BENKARD AFFIDAVIT - AMENDED COMPLAINT (reproduced herein at pages A-20 - A-33) AND SUPPLEMENTAL SUMMONS (reproduced herein at page A-19)

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION

UNITED	S	TATES	DIST	TRI	CT C	OURT
SOUTHER	RN	DIST	RICT	OF	MEM	YORK

JOHN D. DAVIS,

75 Civ. 4862 (M.E.L.)

Plaintiff,

-against-

AFFIDAVIT IN OPPOSITION

RJR FOODS, INC.

Defendant.

JOHN D. DAVIS, being duly sworn, deposes and says:

----X

- 1. I am the plaintiff in the above entitled action and am fully familiar with the facts thereof. I am an attorney at law, admitted to the bar of the State of Ohio. However, since admission, I have been in the business world and have not practiced law.
- 2. I submit this affidavit in opposition to defendant's motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.
- 3. I instituted action for reinstatement, backpay, liquidated and punitive damages against defendant for willful violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 to 634. The basis of my complaint is as follows:
- 4. I was hired by defendant in 1968 as a Brand Director for 2 lines i.e., Vermont Maid Syrup and Davis Baking Powder (Compl. 48). My original hiring was under a 3 year bonus contract expiring December 31, 1971 which was renewed on different and better conditions for a term of 3 years commencing January 1, 1971 and terminating December 31, 1973 (49). In addition to my bonus incentive salary, as an executive, I also received substantial supplemental

benefits such as, hospitalization and major medical insurance for my wife, three children and myself, term life insurance, stock purchase participation plan paid in part by defendant, college scholarships for my children, vacation and retirment plan, physical examinations and participation payroll savings plan (%11).

- 5. Throughout the course of my employment, I was an executive, with full authority over the divisions I supervised, and had an annual budget of \$8,000,000 at my disposal (97). My duties were satisfactorily performed (912-13).
- 6. In the spring of 1972, several corporate changes took place and corporate policy, established by the newly elected president, was bottom-line profitability and development of new products. I met these criteria (\$14-15). As part of the corporate change, one Frantz (\$16) was elected Vice President in charge of Marketing.

Although Frantz admitted that I performed properly, he also said (a) I was too old, calling me "Pop" and in other ways was derisive of me, and (b) in any event I was overqualified for my job (317).

7. On or about June 6, 1972, I was told that my services with the defendant were terminated as of October 6, 1972, but that physically I was to be out of my office that week (¶18). I was replaced by a man under the age of 40 (¶19). In addition to my discharge in violation of the act, the defendant terminated the employment of six other executives over the age of 40 years, who

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSITION TO MOTION were replaced by men under 40 years of age (120) and certain other executives were denoted, reduced in responsibility or had their salaries reduced (521-22). 8. On June 27, 1974, I caused a complaint over my illegal and willful discharge to be filed with the United States Denortment of Labor (524). After that, one Shrewsbury, a Vice Pres-

- 8. On June 27, 1974, I caused a complaint over my illegal and willful discharge to be filed with the United States Department of Labor (124). After that, one Shrewsbury, a Vice President of the defendant, confirmed that only executives under 40 years of age were kept by the company in its move from New York to North Carolina (125). Because of defendant's move South, my complaint was not promptly processed until the Department's report in July, 1975.
- 9. In the course of the investigation made by the Labor Department, the defendant, on or about May 30, 1975, requested a 30 day extension to review the charge of willful violation of the act (727). This extension, so requested by the defendant becomes meaningful as I will relate hereafter.
- 10. I had been told by the Labor Department that its investigation revealed that the defendant told the Labor Department it considered my discharge date to be October 6, 1972 (128) and not June 5/6, 1972, as the defendant now claims. This difference in dates is meaningful, as I will explain hereafter, and elaborate upon in the brief I will submit to this Court.
- 11. Several interim reports were given to me by the Labor Department indicating a willful violation on defendant's part, although no determination on my complaint was made (W29-30). This

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION

compelled me to proceed to protect my statutory rights, within the three year statute of limitations applicable. Accordingly, not to lose my statutory rights, I filed my complaint on October 2, 1975, and on October 8, 1975, filed an amended complaint. A copy of the amended complaint was sent to the Secretary of Labor on October 9, 1975 (see copy of letter from Colman & Liner to the Secretary dated October 9, 1975, annexed hereto as Exhibit 1-A).

- partment would not take any action on my willful discharge complaint.

 Accordingly, to reserve my rights, I filed my complaint and amended complaint in the Federal Courts on October 2 and October 8, 1975 respectively, with a copy of the amended complaint to the Secretary on October 9, 1975. Up to that point, the investigation of the Department of the defendant on my charge of willful violation, had been ongoing from June 27, 1974, the date of my original complaint to it, until October 1, 1975. In this time span of one year and three months, I was in constant communication with the Department and was informed that its investigation, in fact, did indicate a willful violation of my rights on October 6, 1972, the date of my discharge. For that reason, the three year statute of as set forth in the Portal to Portal Act (29 U.S.C. 255(a)) was applicable to me.
- against the defendant's motion to dismiss my complaint, the single proposition, that in the case of a willful discharge, the time restrictions of 29 U.S.C. Section 626(d), and the requirements of initial complaint to the State of New York (29 U.S.C. to 33(b)) are

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-

inapplicable in the case of willful discrimination. My argument is bolstered by the inordinate lengthy time the Department took to process my case (June 27,1974 to October 1, 1975) and the recognition by the defendant that the three year statute of limitations applied to me.

- 14. In that context, i.e., the failure of the Department of Labor to conclude its required preliminary processing for more than one year, the recognition of the defendant of the applicability of the three year statute of limitations to me, my filing of my complaint in the Federal Court on October 2, 1975, preserved my rights and my service of the amended complaint on the Secretary, gave him as much notice of my suit, as his delayed investigation permitted me to give.
- 15. I have stated that my employment continued until October 6, 1972. On June 12, 1972, defendant wrote a letter to me (copy annexed as Exhibit A) wherein it stated that I would be paid until October 6, 1972. While the defendant used the phrase "severance settlement" in its letter, relating that back to the pay period ending June 9, 1972, the contents of the letter showed that in fact, I was continued on the payroll until October 6, 1972, when my termination became effective. This is evident, by the following commitments of the defendant to me:
 - a) my salary was continued to October 6, 1972,
 - b) my group life insurance was continued to October 6, 1972,
 - c) my comprehensive medical plan was continued to October 6, 1972,

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION

- d) deductions from my pay continued for the period June 9, 1972 to October 6, 1972 for group life insurance, comprehensive medical insurance, stock purchase plan and credit union,
- e) my personal loan from defendant was continued until October 6, 1972.
- 16. These physical acts of defendant, all set forth in its letter of June 12, 1972 (Exhibit A), bespeak employment until October 6, 1972, and not termination of employment as of June 26, 1972, notwithstanding deferdants terminology in its letter.
 - 17. On October 12, 1972, defendant wrote plaintiff (Exhibit B annexed) in which it forwarded paychecks "due to you to your termination date of October 6, 1972". The letter stated that the \$500 personal loan had been repaid and confirmed my continued participation in the payroll savings plan.
 - 18. These admissions corroborate what I have said, i.e., that my date of termination of employment was October 6, 1972. Therefore, the statute of limitations started to run from that date and not from June 6, 1972.
 - 19. It is true that no official action was taken by me until June 27, 1974, when my attorney filed a formal written complaint of age discrimination with the United States Department of Labor (Exhibit C annexed). In that letter, my attorney confirmed to the Area Director of the Department that they had a conference several days previous to June 27, 1974, the date of the written complaint. Furthermore, counsel repeated to the Area Director in the statement "After I left you, I spoke with Francis LaRuffa, Regional Solicitor, who informed me that, in his opinion, Mr. Davis' complaint is within the

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION

statute of limitations in view of the fact that termination took place in October, 1972."

- 20. My complaint eventually was referred to the Winston-Salem, North Carolina Office of the Department of Labor, and at that office was referred to Investigator Stewart. I tried to get copies of all reports from the Department but was unsuccessful. Eventually, upon petition to the Labor Department under the Freedom of Information Act, I was furnished with a part of Mr. Stewart's report (copy annexed as Exhibit D).
- 21. The second page of Mr. Stewart's report sharply calls the attention of the Department to a clear cut violation of Title 29 Section 626, etc. It points out New York discriminatory discharge, the retention of younger men, a privilege not afforded to me, and my selectively discriminatory treatment. In summation, investigator Stewart states:

"The firm is in violation of Section 4(a) because they failed to provide the same privileges of employment to Mr. Davis as was provided to younger employees. No valid exceptions were found under Section 4(f).

Mr. Davis should be made whole by re-instatement to his position and lost wages should be restored for period he has not been employed. See Exhibit A-1 for computation."

22. During the pendency of Mr. Stewart's investigation, the defendant, on or about May 30, 1975, requested a 30 day period to review my claim of willful violation. From this request, I conclude the following:

The defendant itself recognized that a willful violation took place and that the three year statute of limitations was applicable. If the two year statute

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION was applicable, then, whether the termination date was June 6, 1972 or October 6, 1972, two years had already elapsed on May 30, 1975, and my claim was time-barred. 23. On the other hand, by asking for an extension of time on May 30, 1975, after the expiration of two years, there was recognition of the applicability of the three year/which would not expire until either June 6, 1975, or October 6, 1975. As I have demonstrated however, defendant itself in its letters of June 12, 1972 and October 12, 1972 (Exhibits A and B) recognized my termination date to be October 6, 1972. Therefore, my filing of my complaint in the Federal Court on October 2, 1972, was timely and within the three years as permitted by 29 U.S.C. Section 255(a). 24. Further substantion of my claim of willful discharge is contained in the report of Department of Labor compliance officer. George Barish, dated July 24, 1974, (annexed hereto as Exhibit E). Mr. Barish makes the following points: a) I remained on the payroll until October, 1972. b) The defendant advised plaintiff that he was overqualified and that while he had done an . excellent job, he was given no explanation for his dismissal. 25. In the interim, while administrative proceedings in the Department of Labor were pending, I could not proceed in the Courts. Finally, as the three year statute of limitations was approaching, my attorney wrote to the Department, as per letter dated August 13. 1975 (annexed as Exhibit F) and asked for an appointment for me to discuss the case. This was after he had met with various officials of the Department and was informed that it looked more favorably on

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSITION TO MOTION

class actions than one to one situations.

26. Finally, on August 1, 1975, I was informed by the Department, that my complaint was "not suitable for litigations the Labor Department", on the grounds that "burden of pro-

Department, that my complaint was "not suitable for litigation by the Labor Department", on the grounds that "burden of proving a willful violation of the Act is, needless to say, greater than proving a non-willful violation". Mr. LaRuffa, the Department's Regional Solicitor, in his letter of October 1, 1975 (copy annexed as Exhibit G) took the position that the facts alleged by me might indicate a statistical age discriminatory he said impact. They were insufficient, to bottom a willful charge. In his opinion against the intercession of the Department in my case, he admits that, if willfulness does exist, then the three year statute indeed does apply to me.

27. In the light of the chronology of the above, I was compelled, by the delay occasioned to me by the Department, to withhold action in the Federal Court, until I filed on October 2, 1975.

after my complaint to proceed had been with the Secretary of
Labor for more than one year. The formalistic demand upon him
to sue, as defendant urges I was required to do within 180 days
of my termination on October 6, 1972, becomes meaningless in the
the failure of
light of/the Secretary of the Department in coming to any conclusion at all. This is equally true as to action in New York State.
The Department, in the various exhibits annexed to this affidavit
admits that not only did the defendants tacitly admit the appli-

AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSI-TION TO MOTION

cability of the three year statute to me by its request for a 30 day extension, but indeed so did the Department. It's subsequent change of heart in this respect goes only to the difficulties of proof; it does not go to the fact, which I allege which in my complaint, and must, for the sake of the within motion be accepted as true.

29. For all these reasons, I respectfully request denial of defendant's motion. Alternatively, I respectfully request deferment of decision on the motion until I am afforded an evidentiary hearing to develop all the facts, and if necessary, incorporate the same in a new pleading.

JOHN D. DAVIS.

Sworn to before me this 28th day of February, 1976.

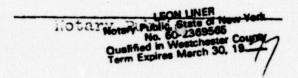


EXHIBIT 1-A TO DAVIS AFFIDAVIT - LETTER FROM PLAINTIFF'S ATTORNEY TO SECRETARY OF LABOR DATED OCTOBER 9, 1975 LAW OFFICES COLMAN & LINER 27 EAST 39" STREET NEW YORK, N. Y. 10016 AREA CODE 212 LEON LINER LOUIS R. COLMAN MILTON A. CHAMBERS

October 9, 1975

699-6703

Secretary of Labor Washington, D. C.

Dear Sir:

Re: John D. Davis v RJR FOODS, INC. 75 Civ. 4862 (U. S. Dist. Ct. Southern District of New York)

I am enclosing copy of amended complaint in the above action. To prevent the tolling of the Statute of Limitations, because of acts . occasioned by the defendant, the original complaint was filed in the United States District Court, Southern District of New York, on October 2, 1975.

A copy of the original complaint, as filed, is also enclosed herewith.

Very truly yours,

Leon Liner

LL:so Enclosures

PLEASE FURNISH SERVICE(S) IND (Additional charges requi	CATED BY CHECKED BLOCK(S)
Show address where delivered	Deliver ONLY to addressee
A	AME OF ADDRESSEE (Must always be filed
SIGNATUR	E OF ADDRESSEE'S AGENT, IF ANY
to m	11.11 11/11/20
DELITERED SHEW WORE	PARTMANT OF LABOR

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EXHIBIT A TO DAVIS AFFIDAVIT - LETTER FROM DEFENDANT TO PLAINTIFF DATED JUNE 12, 1972

RJR Foods, Inc. 750 Third Avenue New York, N. Y. 10017 Telephone 212 986-4700

Foods

June 12, 1972

Mr. Jack Davis 163 Hannahs Road Stamford, Connecticut

Dear Jack:

I am writing to you in an effort to review with you your severance settlement with RJR Foods, Inc. You will receive, commencing with the pay period ending June 9, 1972, 17 weeks salary that will be paid to you on a bi-weekly basis terminating on October 6, 1972. You will also receive, at that time, pay for your 1972 vacation allowance which equals three weeks salary. This severance will be paid upon this basis unless you inform us prior to October 6th, that you have accepted employment elsewhere, at which time, the balance of your severance allowance will be calculated and will be paid in a lump sum together with your pay for unused vacation.

During the period your salary is continued, your group life insurance and Comprehensive Medical Insurance will remain in force. Coverage under both these plans ceases as of October 6, 1972 (or on the date a lump settlement is elected). If you are interested in converting your Comprehensive Medical Insurance to a private plan with the Equitable, you have 31 days after your pay stops to convert. If you are interested in converting to a private plan, please contact me so that I may for and to you a conversion application. If you are interested in converting your life insurance, I would recommend that you contact a local agent of the Equitable Life Assurance Society.

Deductions will continue for your participation under these plans as well as the Stock Purchase Plan and Credit Union until October 6th or until you inform us that you want a lump settlement. Upon discontinuance of your participation in the Stock Purchase Plan, you will receive a certificate for the common shares of stock you have accumulated together with any cash balance. This would be calculated at the end of the accounting period in which your pay stops and you can expect to receive your certificate after approximately six weeks. If you decide that you do not want the certificate and would like payment in cash, please contact me so that we may forward to you the necessary forms for this transaction.

EXHIBIT A TO DAVIS AFFIDAVIT - LETTER FROM DEFENDANT TO PLAINTIFF DATED JUNE 12, 1972

ir. Jack Davis

- 2 -

June 12, 1972

Upon receipt of the termination notification, the Credit Union will calculate your balance in savings and forward to you a check for that amount.

A deduction will be made from your final pay for the advance of \$500 you have outstanding unless you would prefer to mail to us a personal check for this amount.

If you have any questions concerning any of these plans, or if I may be of assistance to you in any way, please do not hesitate to contact me.

I wish you well.

Best regards,

RJR FOODS, INC.

B1-6.

Robert R. Lang Manager, Compensation

RRL: ao

EXHIBIT B TO DAVIS AFFIDAVIT - LETTER FROM DEFENDANT TO PLAINTIFF DATED OCTOBER 12, 1972

750 Third Avenue New York, N. Y. 10017 Telephone 212 986-4700

Foods

October 12, 1972

Mr. Jack Davis 163 Hannahs Road Stamford, Conn.

Dear Jack:

Enclosed please find our check No. 143513 in the amount of \$362.97 and check No. 143512 in the amount of \$894.50. These checks, before the deductions as indicated on the stub, represent your final pay from RJR Foods.

The total of these checks, before deductions, are equal to four weeks salary which is equal to one weeks pay due you to your termination date of October 6, 1972, plus three weeks pay for your unused vacation (total four weeks salary). A deduction has been made for the advance that you had outstanding which totaled \$500.

You have been participating in a payroll savings plan for the Reynolds Carolina Credit Union. If you desire to have the total amount in the savings plan forwarded to you, you must send a letter to the Reynolds Carolina Credit Union indicating this.

I wish you well.

Best regards,

RJR FOODS, INC.

Robert R. Lang

Manager, Compensation

RRL: ao Enclosures

A-56 EXHIBIT C TO DAVIS AFFIDAVIT - LETTER FROM PLAINTIFF'S ATTORNEY TO UNITED STATES DEPART-MENT OF LABOR DATED JUNE 27, 1974 GOLDWATER & FLYNN COUNSELLORS AT LAW 60 EAST 42ND STREET NEW YORK, N. Y. 10017 TELEPHONE MURRAY HILL 2-1411 Juno 27, 1974. United States Department of Labor 26 Federal Plaza Mew York, N.Y. 10007 Mr. Norman Bromberg, Area Director My dear Mr. Bromberg: After I left you the other day, I had my client, John D. Davies, prepare a summary of his background and experiences with respect to his complaint of the saverance from his employer because of age discrimination. The same is enclosed herewith for you. Mr. Davies respectfully requests the Secretary of Labor to institute appropriate proceedings, both investigatory and conciliatory, leading to his possible reinstates at with his amployer. At the time of employment, the employer was located at 733 Third Avenue, New York, New York, and presently is located at 4 Corporate Park Drive, White Plains, New York. There is additional material prepared by Mr. Davies with respect to his claim of discrimination, which is not enclosed herewith, but is available to you at your request. After I left you, I spoke with Francis LaRuffa, Regional Solicitor, who informed me that, in his opinion, Mr. Davies: complaint is within the statute of limitations in view of the fact that termination took place in October 1972. Please feel free to call upon me. LL:DB Rnoi. EXC

NARRATIVE REPORT

Organization

RJR Foods, Inc., is a subsidiary of R.J.Reynolds Industries, Inc. The parent company has corporate offices located at 4th and Hain Streets, Winston-Salem, N.C. See Exhibit D-4, page 1. Corporate offices for RJR Foods were formerly located at 750 Third Avenue, New York, New York 10017. See Exhibit D-4, page 2.

On March 28, 1972, a decision was made to reorganize the company. A decision was also made about the same time to move corporate headquarters to Winston-Salem. See Background Exhibit D-4, pages 2, 3, 4, and 5.

This investigation was initiated because of decisions made affecting employees by reorganization and move to Winston-Salem, N.C.

COVERAGE

ADEA

RJR Foods, Inc., is engaged in manufacturing food and beverage products on a nationwide basis. RJR Foods employs about 1700 personnel. The Company is in an industry affecting commerce within the meaning of Section 11(b) of the ADEA. See Exhibit D-4, page 1.

VIOLATION

4(a): Analysis of records reveals that firm did have 8 Brand Directors prior to June 8, 1972. See Exhibit D-2-b. Reorganization took place. After reorganization the firm had 2 Brand Directors' positions. See Exhibit D-4, pages 9 and 15.

Criteria for selection for Brand Directors' positions were as follows:

- 1) Familiarity with high volume brand of the company
- 2) Individual with the highest productive potential
- 3) Demonstrated performance

See Exhibit D-4, page P, for selection criteria. See Exhibit D-3-M and D-3-N for position description. Former positions of Brand Director required the following

- 1) Freedom of action
- 2) Independence
- 3) Accountability
- 4) Responsibility

See Exhibit D-4, page 13, for former Brand Director's requirements. See Exhibit D-3-L for position description.

EXHIBIT D TO DAVIS AFFIDAVIT - DEPARTMENT OF LABOR NARRATIVE REPORT

R J R FOODS INC. White Plains, New York

MARRATIVE REPORT (continued)

Ratings were developed as follows:

- 1) Familiarity with high volume brand of the company. Employee with highest sales rated 1, next highest 2, etc. See Exhibit 2-b.
- 2) Individual with highest productive potential. Based on incentive earnings, I assigned #1 to person earning highest incentive, #2 to second highest, etc. See Exhibit D-1-b and D-2-a.

The records of the firm clearly show the following:

- 1) Davis and Stanton were the only Brand Directors terminated immediately upon reorganization.
- 2) Younger employees remained with the firm and could look for jobs from their base of operation. This was a privilege Davis did not have. Younger employees were retained by the firm and promoted.
- 3) Davis was on the firm's payroll when vacancies occurred. He was not offered any positions. See Exhibit D-4, page 8. See pages 38 through 40 for Hires after May 1, 1972.
- 4) Davis and all other Brand Directors worked the same positions in the past. His qualifications substantially equaled the two originally selected. He exceeded all others. The firm's only defense is that he is overqualified. See Exhibits D-2-b, D-3-c and D-4, page 47.

5) Records show firm does not hire employees over 45. See Exhibit D-4, pages 38 through 46 for ages at time of employment.

rar. Davis was treated differently from younger Brand Directors. He was told he was being torningted in mediately. Younger amployees resigned. Positions were available for younger workers. Home were available for Davis.

The firm is in violation of Section h(a) because they failed to provide the same privileges of employment to Mr. Davis as was provided to younger employees. No valid exceptions were found under Section h(f).

Mr. Davis should be made whole by re-instatement to his position and lost wages should be restored for period he has not been supplyed. See Exhibit A-1 for computation.

EXHIBIT E TO DAVIS AFFIDAVIT - REPORT OF DEPART-MENT OF LABOR COMPLIANCE OFFICER DATED JULY 24; 1974

July 24, 1974

R.J.R. Foods, Inc. Division of R.J. Reynolds, Inc. 4 Corporate Park Drive White Plains, New York

M.C.: R.J. Reynolds Tobacco Co., Inc. Wimston Salem, North Carolina

This investigation was initiated on the basis of a complaint by an ex-employee.

John D. Davis, 163 Hannahs Road, Stamford, Connecticut 06903, was employed as a brand manager from 1968 through October, 1972. He alleged age discrimination in that he was dismissed because he was 49 years old and that his position was taken by a younger man under 40 years of age. Mr. Davis states that he was replaced by Jerry Arledge, under 40, who in turn was replaced by Hank Steinman, under 30 years of age. Mr. Davis names additional employees who were replaced at the time he was. They are indicated as follows:

Frank Waverfel, Vice President of Sales		Age	53
Frank Stanton, College Inn Director	•		47
Dan Treadwell, New Products			41
Robert Kolisik, Head Research		**	56
Al Stern, Consumer Research		••	41

Mr. Davis states that the average age of executive personnel in 1972 was 45 years old and in 1974, the average age has dropped to 37.4 (exhibit A-1).

William Franz, Vice President/Marketing, is quoted as stating to Bob Gordon, a Vice President, "you're over the hill at your age, all innovations from here on will come from the field. We'll bring in those young kids". William Franz referred to Davis. constantly as "dad".

Robert Carr, Regional Sales Manager, N.E., age 45, was demoted from his job at the

The subject had a reorganization in June, 1972, and at that time the complainant learned that he was being let out. The executive office was being moved to Winston-Salem, and all that would be left would be a small sales office. The complainant remained on the payroll until October, 1972. All personnel changes started to take place at this time. The complainant was advised that with the reorganization, there would be no place for someone as qualified as ne. No officer of any other position was made. The complainant was given no explanation for his dismissal. The complainated did an excellent job during his entire stay with the subject firm (see interview and exhibit A-2).

All payroll records and all personnel records are maintained at the main office. All top level executives work out of the main office.

It is requested that the following investigation activity be conducted at the MO:

- 1. A complete list of executive employees be secured for a two year period.
- 2. A list of executive dismissals and demotions, for the same period, be secured.
- 3. The age of each executive employee hired during this period and the age of each employee dismissed or demoted.
- 4. The name and age of each employee interviewed for an executive position but not necessarily hired.

An analysis of the above information should have a bearing on the validity of the complainant's allegation. Should the above records confirm that discriminatory practices do exist, negotiation and conciliation procedures should be followed.

Mr. Davis would consider returning to the firm at a position similar to the one he previously held.

George Barish Compliance Officer

A-60 EXHIBIT F TO DAVIS AFFIDAVIT - LETTER FROM PLAINTIFF'S ATTORNEY TO DEPARTMENT OF LABOR DATED AUGUST 13, 1975 LAW OFFICES COLMAN & LINER 27 EAST 39" STREET NEW YORK, N. Y. 10016 LEON LINER AREA COOR SER LOUIS R. COLMAN 689-6733 MILION A CHAMBERS August 13, 1975 Francis La Ruffa, Ecq. Regional Solicitor Department of Labor Wage and Hour Eureau 26 Federal Plaza New York, New York 10007 Re: John D. Davis 163 Hannah's Road . Stamford, Connecticut 06903 203- 322-4989 My dear Mr. La Ruffa: Slightly more than one year ago, I spoke with you concerning the above named and his claim-for wilful discharge by his employer R.J. Reynolds Industries, Inc. From that time to the present, after his complaint had been routed to the Fronk office of the Department of Labor and from there to the Greensboro office in North Carolina, an investigation was instituted and recently concluded. A report has been filed by Compliance Officer Stewart (Winston-Salem) which was forwarded to Regional Director Klaubard. During the course of the investigation, Mr. Stewart was most cooperative with me and Mr. Davis. For this I wish to express my thanks for his solicitude and understanding of the problems involved. The investigation was delayed for thirty days at the request of R. J. Reynolds and agreed to because it was necessary to let the Company have this additional time in a wilful violation complaint case so that it would not later be thrown out of court. Mr. Stewart, with the consent of Mr. Davis, went along with this request. Mr. Stewart's superior also acquiesced. It would not be axiss to call your attention to the fact that relatively substantial sums of money are involved, inasmuch as at the tire of the dismissal, Mr. Davis was in the \$50,000 a year bracket, plus increments, bonuses and other fringe benefits. I ret with Messer. Klaubard and Taresh at the Pronx office on July 29, 1975. They told me that any action undertaken by the government could be dependent upon an opinion furnished by your office. It was explained to se that your office has a very leavy case loan and that generally

A-61 EXHIBIT F TO DAVIS AFFIDAVIT - LETTER FROM PLAINTIFF'S ATTORNEY TO DEPARTMENT OF LABOR DATED AUGUST 13, 1975 MIMAN & LINER . Francis La Ruffa, Esq. -5-August 13, 1975 it looks more favorable upon class actions than one to one situations. Coviously, I understand this, but find it very difficult to convince an injured party of the equitable application of this doctrine in relation to his personal claim. Messrs. Klaubard and Baresh told me that it would be appropriate for me to communicate with you directly for an appointment to discuss this case. I have waited this period of time since the case was sent to you to permit a sufficient period of time to elapse for you and your associates to become familiar with the file. The urgency of the situation is the following: I am leaving for the west coast for an extended period of time. I will not be able to mest with you or any of your associates in person. In the meantime, the statute of limitations may be tolling against Mr. Davis for the reasons set forth in the file. Because of these circumstances, I respectfully request that you afford Mr. Davis a few moments of time to discuss the file with him. Not only is Mr. Davis a qualified business executive of high type, but in addition to this background, he received a law degree and was admitted to the Ohio bar. He is fully conversant with all the fine nuances of the Labor Law insofar as it is applicable to discrimination because of age. I would appreciate any courtesies extended to Mr. Davis because of the extenuating circumstances related above. truly yours, LL:EO

P.S. This letter has been given to Mr. Davis for hand-transmittal to you. I would appreciate your compliance with my request. LL:so

EXHIBIT G TO DAVIS AFFIDAVIT - LETTER FROM DEPARTMENT OF LABOR REGIONAL SOLICITOR TO PLAINTIFF DATED OCTOBER 1, 1975 Tel. 212-971-5464 SOL: FR: JR BEST COPY AVAILABLE October 1, 1975 Mr. John D. Davis 163 Hannoh's Road Stanford, Conn. 06903 Dear Mr. Davis: Re: Age Discrimination in Employment Act of 1967 Complaint of John D. Davis, Stamford, Connecticut We have carefully reviewed the investigation file concerning the age discrimination in employment complaint made against PJR Foods Inc. For the reasons stated herein, it is the conclusion of both my office and that of the National Office of the Solicitor that the matter is not suitable for litigation by the Labor Department. The Age Discrimination in Employment Act prescribes a 2-year period of limitations for an action based on nonwillful violations and a 3-year period when the violations are willful. In the context of the age discrimination statute, "willful" means "violations which are intentional, knowingly and ... voluntarily made as distinguished from accidental, innocent or for good reason acts" (Hodgson, Secretary of Labor v. Ideal Corrugated Fox Company, 10 BNA Fair Employment Practice Cases 744, 8 CCH Employment Practices Decisions 19805 (N.D. W.Va. 1974)). The burden of proving a willful violation of the Act is, needless to say, greater than that of proving a nonwillful violation. : ·· ; In the instant case, you did not bring your complaint to the Labor Department until late June 1974: more than ? years after being first notified in early June 1972 that your employment by RJR Foods was being terminated. Apparently no work was performed by you for the company after June 9, 1972. By letter dated June 12, 1972, however, PAR wills Societalis

A-63

EXHIBIT G TO DAVIS AFFIDAVIT - LETTER FROM DEPARTMENT OF LABOR REGIONAL SOLICITOR TO PLAINTIFF DATED OCTOBER 1, 1975

De were intermed that, as part of a severance pottlement, you would continue to receive regular salary until October 6, 1972. Thus, the Company noted in a subsequent "position statement" that your "last day of work with the company was June 9, 1972, but you were paid through your official termination date of October 6, 1972."

On these facts, we believe that the courts would probably find that any violation of the ADEA arising out of this discharge occurred as of June 9, 1972, at the latest, and

On these facts, we believe that the courts would probably find that any violation of the ADEA arising out of this discharge occurred as of June 9, 1972, at the latest, and cannot be construed as "continuing" until the last receipt of severance pay. Especially pertinent in this regard is the very recent Court of Appeals decision in Hiscott v. General Electric Company, not yet reported (C.A. 6, No. 75-1131, decided September 4, 1975). In that case, it was held that the on-going receipt of pension benefits, substantially reduced as the result of an allegedly discriminatory forced retirement, would not constitute a violation "continuing" beyond that date of actual discharge. While the instant case is, of course, factually distinguishable, there is no reason to believe that any court would treat the analogous legal question in a contrary manner.

Accordingly, from the very outset the only option available was to charge RJR Foods with a willful violation in firing you and even that option is no longer available. As a practical matter, this case was not well suited to litigation on a willfulness charge. While our investigation did reveal some statistical evidence which might arguably show an age-discriminatory impact in the terminations preceding the company's move from New York to North Carolina, there was no hard evidence to indicate that age was a determinative factor in making the discharges — let alone, that age was "intentionalfly, knowingly and voluntarily" applied as a factor in the decision-making process.

In these circumstances, we have decided not to litigate your age discrimination in employment complaint.

Sincerely,

Francis V. LaRuffa Regional Solicitor

cc: Leon Liner, Esq.

ADDITIONAL AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS

Plaintiff,

-----Y

S. D. OF M. J.

75 Civ. 4862 (M.E.L.)

v.

RJR FOODS, INC.

Defendant.

SS,:

STATE OF NEW YORK

COUNTY OF NEW YORK

JOHN D. DAVIS, being duly sworn, deposes and says:

- 1. I am the plaintiff in the above entitled action and have personal knowledge of the facts.
- 2. Heretofore, I have instituted an action in this court for age discrimination. My complaint, defendant's motion to dismiss, and my response, are now before the court for determination.
- 3. Not included in the complaint are the following facts, which are advanced to the court in substantiation of the request for an evidentiary hearing for further development of the facts prior to the court's determination of the motion to dismiss.

ADDITIONAL AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF,
IN OPPOSITION TO MOTION

4. a) Defendant claims termination of my employment occurred on June 6, 1972. I have stated that my employment was terminated on October 6, 1972.

b) I was employed by Dancer-Fitzgerald-Sample, Inc., the advertising agency retained by defendant, pursuant to contract of employment dated April 2, 1973.

- 5. The New York State statute for age discrimination requires application to it within 300 days of termination of employment.
- 6. If the defendant's version of the termination of employment is accurate, as it asks this court to believe, then exactly 300 days elapsed between June 6, 1972, the disputed day of termination of employment, and April 2, 1973, the date of the signing of the contract of employment with Dancer-Fitzgerald-Sample, Inc., the "captive" advertising agency of the defendant.
- 7. Mathematically, 314 days elapsed from the date of the alleged termination of employment on June 6, 1972 to April 16, 1973, the date of the commencement of work at Dancer-Fitzgerald-Sample, Inc.
- 8. Under the Federal Age Discrimination Act, there is a requirement for notification and demand upon the Secretary of Labor within 180 days of the termination of employment. The termination

ADDITIONAL AFFIDAVIT OF JOHN D. DAVIS, PLAINTIFF, IN OPPOSITION TO MOTION

date of October 6, 1972, as set forth in defendant's letter to me of June 12, 1972 (Exhibit "A" attached to my affidavit in opposition, a copy of which is annexed hereto for the court's convenience), indicates 178 days expired by April 2, 1977, the date of my contract with Dancer-Fitzgerald-Sample, Inc., with employment to commence on April 16, 1973, 192 days after October 6, 1972

- 9. The above timetable illustrates what I ask this court to permit inquiry into. Are these mere coincidences of the calendar or do they suggest deliberate timing by a defendant will its own advertising agency, so as to lull me into a false sense of security and thus deprive me of my rights in law?
- 10. The facts as related above, warrant, I respectfully request, an evidentiary hearing prior to the court's determination of the motion before it.
- 11. Alternatively, if the court does not grant the evidentiary hearing application, I make a further request, that is, that I be given the right to amend my complaint to include allegations incorporating the above facts and simultaneously with such amended complaint, I be given the opportunity to examine the defendant before trial and engage in all pretrial procedures, prior to any further motions to dismiss be made.

Sworn to before me this 14th day of May, 1976.

phy D. Davis

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS,

Plaintiff,

75 Civ. 4862

-against-

RJR FOODS, INC.,

MEMORANDUM

45231

Defendant.

APPEARANCES:

COLMAN & LINER, ESQS.
535 Fifth Avenue
New York, New York 10017
Attorneys for Plaintiff
Of Counsel: LEON LINER, ESQ.

DAVIS POLK & WARDWELL, ESQS.

One Chase Manhattan Plaza

New York, New York 10005

Attorneys for Defendant

of Counsel: JAMES W. B. BENKARD, ESQ.

SHEILA T. McMEEN, ESQ.

MICROFILM 00T 1 2 1273 •

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LASKER, D.J.

John D. Davis brings this action against RJR Foods, Inc., a corporation qualified to do business in New York, alleging unlawful age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 20 U.S.C. \$621 et seq. Defendant moves to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Davis alleges that he was discharged from his executive position as brands director of RJR when that company's management underwent a change and instituted a policy terminating the employment of older employees. Davis, aged 49 at the time, received notice of his termination on or about June 6, 1972, although he continued to receive the benefits of employment (including salary, life insurance coverage, medical insurance coverage and other fringe benefits) until October 6, 1972. On June 27, 1974 Davis filed a formal complaint of willful age discrimination with the United States Department of Labor (DOL). Thereafter the DOL began its investigation of the matter, determining, approximately sixteen months later, that the case was inappropriate for agency action. On October 2, 1975, Davis instituted this proceeding. He seeks reinstatement and back pay from 1972 to the present, or alternatively, \$500,000. in compensatory damages and \$5,000,000. punitive

ORDER AND DECISION APPEALED FROM damages.

RJR moves to dismiss the complaint on the grounds of Davis' failure to comply with the procedural mandates of the ADEA. Davis neither filed a timely notice of intent to sue with the Secretary of Labor, 20 U.S.C. \$626 (d), nor commenced proceedings under State law prior to commencing his federal suit, 29 U.S.C. \$633(b).

In answer, Davis asserts that the filing requirements of 29 U.S.C. \$626(d) and the deferral requirement of \$633(b) are inapplicable to cases of willful discharge.

Proceeding on this theory Davis argues that his suit was timely filed because it came within the three year statute of limitations (the period applicable to a willful violation). Davis also denies that resort to State remedies is a prerequisite to bringing suit in federal court.

Finally, he alleges that his employment by Dancer Fitzgerald Sample, Inc., the advertising agency retained by the defendant, approximately 180 days after his employment benefits with defendant ceased, lulled him "into a false sense of security" and deprived him of his "rights in law."

I.

Filing Requirements Under the ADEA

The ADEA requires that before bringing suit in a federal court a plaintiff must, within 180 days of the alleged act of discrimination, file a notice of intent to sue with the Secretary of Labor. 29 U.S.C. \$626(d)(1).

If the State in which the unlawful practice occurs has enacted a law prohibiting discrimination in employment, the period is extended to 300 days after the discharge. prerequisite to suit whether regarded as jurisdictional or otherwise, enables the Secretary to undertake conciliation efforts promptly and insures "that potential defendants become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination Powell v. Scuthwestern Bell Telephone Company, 494 F.2d 485, 488 (5th Cir. 1975). Considerable authority exists for the proposition that the filing requirement is a jurisdictional "prerequisite to the right to file any suit whatsoever under the ADEA." Id. at 487. See also Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975); Raynor v. Great Atlantic & Pacific Tea Co., 400 F.Supp. 357 (E.D. Va. 1975); Oshiro v. Pan American Airways, Inc., 378 F.Supp. 80 (D. Hawaii 1974); Gebhard v. GAF Corp., 59 F.R.D. 504 (D.D.C. 1973). Nevertheless, there is also respectable support for the view that the filing requirement amounts to a statute of limitations only and that accordingly it may be tolled. See Dartt v. Shell Oil Company, ___F.2d ___ (10th Cir. 1976); Skoglund v. Singer, 403 F.Supp. 797 (D.N.H. 1975). Such tolling has been found proper where the plaintiff was a layman with little litiga-

tion experience, Skoglund, supra, at 801; where the plaintiff had been misinformed by the Department of Labor when seeking timely advice, Dartt, pra, cf. Vaughn v. Chrysler, 382 F.Supp. 143, 146 (E.D. Mich. 1974); or where the defendant employer has not advised the plaintiff of his rights by posting notices as to the provisions of the ADEA as required by 29 U.S.C. \$627. Skoglund, supra, at 804. Whatever the factual situation, the equities must clearly warrant such an extension of time.

II.

The Federal/State Relationship

Section 633 of the ADEA addresses the relationship between Federal and State agencies charged with enforcement of age discrimination statutes. Where the State in which the alleged discriminatory act occurred has enacted a statute similar to the ADEA, any action by the Secretary of Labor must initially defer to action by the appropriate state agency. In the language of \$633, no federal action may be instituted "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated...."

29 U.S.C. \$633(b). Several courts have interpreted this language to require resort to State agencies prior to commencing suit in federal court although they have also noted that equitable considerations may justify waiver of

this requirement. See Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974); Vaughn v. Chrysler, supra, at 144-46; Smith v. Crest, 9 E.P.D. ¶10,053 (W.D.Ky. 1974); But see Vazquez v. Eastern Airlines, 405 F.Supp. 1353 (D. Puerto Rico 1975) holding that \$633 does not require initial resort to a State agency at all.

New York Human Rights Law \$296 (McKinney Executive Law 1975) prohibits discrimination on account of age.

Thus, according to the predominant authority Davis must have initially pursued his State remedies with the appropriate State agency unless some countervailing considerations, as for example, detrimental reliance upon official advice, Vaughn v. Chrysler, supra, at 146, exist to justify equitable waiver of the deferral requirement.

III.

Applicability of the ADEA Filing and Deferral Requirements to Davis

It is unnecessary to decide whether the filing requirements of \$626(d) and the deferral requirements of \$633(b) are j isdictional prerequisites or more flexible rules subject to tolling or waiver in light of equitable considerations, since in the case at hand, the facts do not warrant a departure from the general rule. Davis is not a layman but an attorney admitted to the bar in the State of Ohio, although he has never practiced law. Discharged in

June of 1972, he did not file his complaint with the DOL until two years later, in apparent disregard of the ADEA requirement that notice of intent to sue be filed with the DOL a maximum of three hundred days after discharge. (the period applicable where the State in which the offense occurred has a law prohibiting discrimination). Moreover, \$626(d) requires that the Secretary of Labor be served with notice of intent to file suit. A mere complaint lodged with the Department of Labor is insufficient to fulfill this plain mandate. Dartt v. Shell Oil Co., F.2d (10th Cir. 1976); Powell v. Southwestern Bell Telephone Co., 494 F.2d 485, 489 (5th Cir. 1974); Grossfield v. Saunders, 1 FEP cases 624 (S.D.N.Y. 1968); contra, Woodford v. Kinney Shoe Corp., 369 F.Supp. 911 (N.D. Ga. 1973).

Davis argues that the notice requirement does not apply to a willful violation. The statute, however, makes no distinction between the filing requirements for willful and nonwillful violations, although it does distinguish between the two types of violations for purposes of the statute of limitations. (A willful violation invokes a three year period of limitations, while a nonwillful violation invokes only a two year period.) 29 U.S.C. §626(e) Indeed, in Gebhard v. GAF, supra, where the plaintiff alleged that he was discharged as "part of a calculated plan to replace senior employees with their younger counterparts,"

the district court for the District of Columbia dismissed the action for failure to comply with the notice requirement of \$626(d). Id. at 506. Moreover, it is clear that the notice requirement of \$626(d) is in addition to the statute of limitations and a claimant may lose his rights under the Act by failure to observe the notice requirements even though the statute of limitations has not yet run. See Powell v. Southwestern Bell Telephone Co., supra. Thus, in the instant case, even if there had been a willful violation which invoked a three year statute of limitations, this fact does not excuse plaintiff's failure to undertake his obligation to file a notice of intent to sue with the Secretary of Labor.

Davis' final defense is that he was lulled into a false sense of security when hired by Dancer Fitzgerald Sample, Inc., whom he describes as a "captive" of the defendant. He requests an evidentiary hearing to determine whether his employment by Dancer Fitzgerald, six months after the date which he perceives as his date of discharge, (October 6, 1972) was a "mere coincidence of the calendar or ... deliberate timing by a defendant with his own advertising agency ... to ... deprive [Davis] of [his] rights in law." Since October 6th is unacceptable as Davis' termination date (see note 1), his vague suggestion that his employment by Dancer Fitzgerald was calculated to co-

incide with the 180 day filing requirement of \$626(d) loses much of its force. Moreover, his unsupported claim that Dancer Fitzgerald is RJR's "captive," or that his employment by them was part of a plot to extinguish his right to sue, is altogether insufficient to warrant an evidentiary hearing.

For the reasons stated, the defendant's motion to dismiss is granted.

It is so ordered.

Dated: New York, New York October 8, 1976.

U.S.D.J.

FOOTNOTES

- 1. Davis suggests that the court should accept the October date, rather than the June date on which he received notice of termination, as the time from which all filing and limitations requirements are to be measured. By his own admission Davis' services for RJR ceased on June 6, 1972. Although he continued to receive his salary and other benefits until October 6th, this in no way prolongs his actual employment with RJR. A logical extension of Davis' reasoning would equate the receipt of pension benefits by a retired employee with continuous employment. Such a proposition is patently without foundation.
- 2. "(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed--
 - (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
 - (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

29 U.S.C. §626(d).

- "Limitation of Federal action upon commencement of State proceedings
 - (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under

the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

29 U.S.C. \$633(b).

- 29 U.S.C. \$626e incorporates \$255 of that title which provides in pertinent part.
 - "(a) ... the cause of action accruing on or after May 14, 1947 may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;"

29 U.S.C. §255(a).

5. The statute provides an alternative:

"or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

29 U.S.C. \$626(d) 2.

6. "Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

29 U.S.C. §627.

A-78 NOTICE OF APPEAL

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

JOHN D. DAVIS.

Plaintiff.

75 Civ. 4862 (M.E.L.)

RJR FOODS, INC.,

Defendant.

NOTICE OF APPL

Notice is hereby given that JOHN D. DAVIS, plaintiff and named, hereby appeals to the United States Court of Appeals the Second Circuit from the order of Hon. Morris E. Lasker, entered in this action on the 8th day of October, 1976, dismissing the complaint pursuant to Rule 12B-1 of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Dated: New York, N.Y. November 3, 1976.

COLMAN & LINER

Attorneys for Plaintiff Office and P.O. Address 535 Fifth Avenue

New York, N.Y. 10017

212/682-7580

TO:

DAVIS POLK & WARDWELL Attorneys for Defendant 1 Chase Manhattan Plaza New York, N.Y. 10005

STATE OF NEW YORK) COUNTY OF NEW YORK) SS.:

Munay H. Beman, being duly sworn, deposes and says/that deponent is not a party to the action, is over 18 years of age and resides at 55 E10155
NY NY 10003
That on the 28th day of January , 1977, deponent personally served the within
Appendix
upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.
By leaving one true copy of same with a duly authorized person at their designated office.

MIXOTHEX NATURAL EXECUTION OF A REPORT OF MAXIMUX Yanda.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

> Davis Polk & Wardwell Attorneys for Defendant-Appellee 1 Chase Manhattan Plaza New York, New York

Sworn to hefore me this

Muny H Benne 27 Michael De

No. 03-0930908

Outlified in Bronx County

Light Expires March 30, 1975